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ABSTRACT

Richard Delgado and Jean Stefanic have examined a series of legal decisions they consider to be "serious moral errors," "embarrassingly inhumane decisions," and "moral abominations." Departing from their exploration of bad judicial decision making, this paper points out some examples of bad decision making in higher education. It identifies four examples of bas educational policy making and discusses why each is bad. The first is legacy or alumni preference admissions, a policy that is unfair, especially to minority students. The second is tying state appropriations to test scores. The third is program discontinuance as a way to get rid of faculty members. A fourth is playing immigration "cop," and making determinations about a student's right to be in the United States. (Contains 29 references.) (SLD)

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Governing Badly: Theory and Practice of Bad Ideas in College Decisionmaking

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There is remarkably little literature, of either a theoretical or qualitative bent, on institutional failures, or the policy failures that lead to bad decisionmaking. There is, of course, much literature on maximizing decisionmaking, where not understanding college metaphors results in bad choices. Thus, the inverse of James March's garbage-can model, Victor Baldridge's political power model, James Millett's scholarly community model, and the many other such theoretical bases would lead to had decisionmaking. Ignoring Sabatier and Mazmanian's Implementation Theory, Canon and Johnson's Compliance Theory, Cobb and Elder's Agenda Building Theory (Mazmanian & Sabatier, 1983; Cerych & Sabatier, 1986; Cobb & Elder, 1983), and other political science theories will likely lead to ineffective structural inculcation of policy decisions in any meaningful fashion. That poor policymaking is not the subject of theoretical work is likely due to scholars' trying to make sense of what actually works and what theories advance our understanding of higher education organizations. It is unsurprising, therefore, that so little theory focuses upon bad theory and ineffective implementation per se, even if the absence of X might have considerable explanatory power.

There is a small literature on bad college decisionmaking, one that largely consists of case studies of failure. The best example of this genre is the qualitative study by Jerrold Footlick, a reporter who wrote Truth and Consequences: How Colleges and Universities Meet Public Crises (1997), a book that included nine chapters devoted to

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higher education institutional failures to communicate with the media about scandals or major disasters. These case studies run from the University of Utah's embarrassing treatment of "cold fusion" and Ohio State's firing of truculent football coach Woody Hayes to a court case at the University of Georgia (Jan Kemp's firing over her whistle-blowing on practices in an athletics support program) and the campus judicial system on trial at the University of Pennsylvania (hate speech and the "water buffalo" matter). Of course, not all of the case studies -- all of them interesting topics in their own right -- were about failures of governance, although some clearly were such failures, such as the case of President James Holderman of the University of South Carolina, who actually served jail time for fraud. Footlick notes allegations that Holderman, with considerable information on inappropriate spending and sexual habits, was not reigned in by trustees, despite all the evidence; a former governor accused the board of being "blinded through political drunkenness" (Footlick, 1997). In Footlick's eyes, all the cases were examples of how badly higher education interacts with the press and other media.

Mining another vein of bad decisionmaking, law professor Richard Delgado and legal researcher Jean Stefancic examined a series of legal decisions that they consider to be "serious moral errors," "embarrassingly inhumane decisions," and "moral abominations" (Deglado & Stefancic, 1991). Such cases include now-discredited decisions in racial matters, Indian law, Chinese immigration and Japanese internment, woman's suffrage, forced sterilization, and gay rights. Most are older cases, now eclipsed by different norms, different times, different assumptions (although the gay rights case is 1986, only four years before they wrote their law review article). Here is how they define their cases:

> The concept of "serious moral error" is, of course, impossible to define and perhaps ultimately incoherent. We use the term in three limited senses. A decision will be said to embrace serious moral error if (1) it lacks nuance to an embarrassing degree; (2) it is broadly or universally condemned by subsequent generations, somewhat akin to being overruled; (3) its assumptions, e.g., about women, are roundly refuted by later experiences. Judges will always hand down decisions that will seem offensive to some. We reserve the term "serious moral error" for those shocking cases that virtually everyone later condemns. (Delgado & Stefancic, 1991, p. 1930)

Delgado and Stefancic's intriguing take on bad judicial decisionmaking is instructive, for their criteria are straightforward, and they examine the cases by parsing them and showing alternative results. Several of their picks were 19th Century racial blunders, such as those affecting blacks (Dred Scott and Plessy v. Ferguson), Native Americans (Johnson v. M' Intosh, where Chief Justice John Marshall characterized Indians as "fierce savages, whose [chief] occupation was war"), Chinese (immigration restrictions), and a 20th Century case involving Japanese (internment cases, such as Korematsu v. U.S.). Another 19th Century case, Bradwell v. Illinois, allowed Illinois to bar law graduate Myra Bradwell from practicing law because she was a woman, and because the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of Civil life." Their 20th Century choices included the 1927 forced sterilization case ["The principle that sustains compulsory

vaccination is broad enough to cover cutting the Fallopian tubes" (Buck v. Bell)] and the more recent 1986 case that upheld Georgia's sodomy statute (Bowers v. Hardwick), already notorious by the time they wrote their 1990 article. By then, retired Justice Lewis Powell had already recanted his decision to uphold the decision (Agneshwar, 1990, p.3).

Let me take stock. Clearly, we can learn from bad decisionmaking, and indeed, do so on a regular basis when we evaluate actions and policies. Although there is a weak theoretical basis for understanding such errors, it is a soft science at best, and one that is largely anecdotal. It may also be true that the actual implementation of policy clears up or rounds the corners off excesses. I regret my stab at this issue may not advance the theory ball very far up the hill, as it is a first attempt, but I do propose some theoretical hypotheses and considerations at the end of the chapter.

My own candidates for bad policymaking include cases where I believe decisionmakers disregarded good sense, did not consider the full range of alternatives, and made bad choices that were avoidable. In a footnote, Delgado and Stefancic characterize these mistakes as technical ("failing to reflect carefully on precedent") or as ones of prudence (e.g., "exercising bad business judgment in a contract matter") (1991, p. 1930). The many regental or administrative or agency decisions made on a daily basis in higher education are not written down or published in a search engine for their precedential value, like court decisions, so relatively little "academic common law" accretes over time, correcting errors or overturning bad decisions.

In the next section, I propose four examples of bad policy making, and speculate on why each is bad. Of course, none is the policy equivalent of Dred Scott or Korematsu v. U.S., but I hope readers agree that each is a bad idea by the criteria I pose. In my final

section, I ruminate on the criteria, anticipate objections, and suggest areas for future scrutiny.

a. Legacy or Alumni Preference Admissions

Despite substantially changed demographics and rapidly changing conditions, many public colleges, including ones in Texas, continue to employ a criterion that is unearned by the applicant, is unrelated to the applicant's merits, is highly correlated with wealth, and is almost a perfect proxy for race - -legacy credit. Legacy credit, also called "alumni privilege," is a seemingly innocuous entry in the admissions laundry list employed by many colleges, but I believe that it has no proper place in public college admissions criteria. My reasoning includes four interrelated points: 1) the practice is fundamentally unfair, as it does not incorporate merit or achievement, but rather, advantage; 2) the practice is particularly unfair in Texas, and in jurisdictions not legally allowed to practice affirmative action in the admissions practice; 3) legacy admissions are acceptable and appropriate for private independent institutions, but even in this non-public sector, colleges should use them cautiously; 4) legacy practices, where appropriate, should reward parental attendance, but should not be extended further - - either horizontally (siblings) or vertically (grandparents).

First, the practice itself is unfair. If your parents attended college, you already have been conveyed several clear advantages. It means the applicant comes from a well-educated family, and therefore already inherits many economic, educational, and other psycho-social benefits. Alumni parents - - even in schools without formal legacy practices - - often are also able to convey a benefit by personally contacting admissions officials to inform them of their child's interest in attending alma mater. Thus, the benefit

is conveyed even in a non-preferential world. And make no mistake, it is preferential. A February 5, 1999 Chronicle of Higher Education story revealed that Texas A&M University admitted 2,000 - 3,000 legacy students in 1996-97, and quoted TAMU officials as indicating that for 200 students, alumni preference was the "deciding factor" (Kenneth, 1995). That number was more than the number of African Americans who enrolled as freshmen at TAMU that year. Data from TAMU show that in the year 2000, 201 such students were admitted, primarily on plus points.

I am certainly not saying that all other criteria are meritorious or show the true abilities of applicants. After all, family income also clearly correlates with standardized exams; and access to Advanced Placement, honors, calculus, Latin, and other advantaged curricular opportunities also track wealth through high school location. But legacy credit simply piles on, without any achievement by the applicant. Moreover, unlike race, which is predominantly a proxy for disadvantage, alumni or legacy admissions are an attribute of privilege and advantage.

Second, this practice is particularly unfair in a state such as California or Washington, where the use of race is proscribed, or a Fifth or Eleventh Circuit state where a misguided court opinion has restricted colleges' ability to use race as a factor in admissions, notwithstanding Bakke. Many opponents to affirmative action have persuaded the courts and public opinion that any use of race is unfair. Where are they now, with this proxy for white advantage? That TAMU would use it is particularly pernicious, given the institution's longstanding practices of excluding women and people of color. TAMU has not provided racial data, but my discussion with TAMU admissions officials suggests that virtually all such admits are Anglo, as would be

expected. The University of Michigan admissions cases revealed UM's use of this device as well (Gratz v. Bollinger).

To make matters worse, some schools such as TAMU extend this privilege to Aggie brothers and sisters, not just parents. (I wish I had known this, as I am the oldest of ten children.) Even if states choose to use alumni points, they should restrict legacy admissions points to children of graduates. If, as I have argued, parental preference is bad enough, brothers and sisters are even more attenuated and even poorer public policy.

Third, it is true, as some legacy supporters will say, that courts have upheld the practice. I acknowledge that courts have done so, and recently. The dreadful Hopwood opinion appears to allow the practice, as does the recent decision in one of the University of Michigan admissions cases. In the former, the Hopwood panel decision reads, "A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni" (Hopwood v. Texas). And in a recent ruling, Michigan U.S. District Judge Patrick Duggan held that with regard to University of Michigan alumni privileges, "there is no overall discriminatory impact" (Grutter v. Bollinger).

However, both courts got it wrong, in my judgment. Hopwood is wrong in several respects, and I will not bore the readers with this pleading. In the alternative, I can recommend a number of articles, including my own, which address this topic and provide relief for insomnia. Judge Duggan did not analyze the race of the UM legacies, and discounted them, even though the legacy points figured in more admissions to UM than did their affirmative action practice in most years. The best and most cynical insight

into this phenomenon comes, predictably, from the late Justice Blackmun, who said in Bakke, "[Colleges] have given conceded preference up to a point to those possessed of athletic skill, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful" (Bakke v. Regents). But even if courts were correct, and this criterion were allowable, I raise the question of whether, as a matter of public college policy, it should be. I, of course, answer in the negative. Private schools, without any constitutional restrictions, may do so. Publics should not.

Fourth, I have heard minority admissions officials and even minority legislators, tell me that in time this will work out so that Black parents and Chicano parents in Texas can eventually pass this privilege on to their children, now coming of age. I believe this eventuality is chimerical and will simply never come true. Juxtapose the numbers of white alumni parents whose children apply to college with those few minorities who are in a position to pass it on. Indeed, in Texas, the graduation data suggest that in selective public colleges, the arc of such admissions will never improve to the point where alumni privilege produces points for a substantial number of minority parents.

In Hopwood, the panel judges would allow alumni privilege, which they termed the applicant's "relationship to school alumni"; they also concluded that a college could consider "whether an applicant's parents attended college" (a first-generation preference). In the context of law schools, consider these two criteria: one rewards applicants fortunate enough to have parents who were allowed to attend the law school, and one rewards applicants whose parents did *not* attend college. When implemented at public schools, the former criterion excludes substantial numbers of African Americans,

Mexican Americans, and Asians. At the University of Houston, which became a public institution in 1963-64, the first black law student did not graduate until 1970; fewer than one dozen Mexican Americans graduated before 1972. Even as recently as 1971, UTLS enrolled no black students in its first-year class. Children of early 1970s UTLS minority graduates, if born while their parents attended law school, would now be eligible for the alumni preference-but-they would be in competition with the thousands of white applicants who could invoke the privilege. While it is true that the latter criterion (first-generation preferences) would more likely favor minority children whose parents were denied admission or were unable to attend college, many uneducated white parents would likewise transmit this "advantage." A Texas Coordinating Board study group, which recently reviewed alternative admissions criteria, determined that there is no good proxy for race (Texas Higher Education Coordinating Board). Deracinating the racial criterion simply cannot work.

Of course, there is a trickle of minority alumni at states' elite public colleges, but it is just that, a trickle, not the river we should have expected from most states' public K-12 school figures. The 4-out-of-100 points TAMU awards many not seem like a big matter, but if it is not, shouldn't the presumption be that they and other public colleges do not need it? When TAMU admits nearly 11,000 students each year, and between 2,000 and 3,000 have the extra 4 points out of the 100 total accorded alumni legacies, can it be a small matter? I urge faculty at institutions with these practices to rise up and insist they be stopped.

These cases, and many others I could have analyzed, show that the distribution of scarce benefits remains a contentious issue, one that divides American society along

fronts of race, class, ethnicity, gender, and other dimensions. Like immigration cases that define who we are as a polity or as a people, so do admissions cases define us as a nation. Inasmuch as higher education is the great engine of upward mobility in our society, how we constitute our student bodies is an important consideration. Unfortunately, due to historical racism and unequal educational opportunity, race remains a fugue in postsecondary education to this day. Therefore, understanding the admissions process and the practices that form its common law is an important key to understanding our country's complex racial history.

b. Tying State Appropriations to Test Scores

In an understandable attempt to improve the quality of public schools over the last twenty years, legislatures have enacted plans to tie tax revenues to school district performance, such as conditioning state aid upon student test scores, teacher certification, or other markers. For example, Texas enacted a "career ladder" program in the 1980's, which promised pay raises for certain teacher behaviors; another statute created "master teacher" certification, which was never funded and was very unpopular with teachers, who both distrusted the program's requirements and who did not believe the state would back the program with any money. There have even been privately-funded efforts, such as those instituted by the Milken Family Foundation, which award grants to teachers whose students score well on state-required exams. Of course, the charter school movement has also tied resources in some instances to student performance in the special programs.

States have also linked increased funding to the performance of their colleges. For instance, performance funding criteria reward additional resources to colleges in Colorado that graduate minority students, while public institutions in other states receive additional formula aid for students who take their degrees within five years (Statewide Expectations and Goals for Higher Education, 2003). At the margins, such formulae may stimulate colleges to improve their performance, although they can backfire if a college takes fewer at-risk students and reduces access overall by skimming off only less-needy prospects. Or institutions can "game" such statutes and regulations by exploiting loopholes, creating new casks for old behavior, or seeking exemptions. In a 1986 study, for instance, I found that colleges were largely ignoring changes in immigrant student policy, following a U.S. Supreme Court decision that rendered the practices illegal or obsolete (Olivas, 1986). Like my nephews who rake my yard badly so I'll send them away, colleges can drag their feet rather than implement legal or policy mandates. Institutional foot-dragging likely sabotages many more top-down requirements than is generally acknowledged. Department chairs can outwait deans, who can outlast provosts, etc. And not many cases, statutes, or regulations come with effective enforcement mechanisms or implementation tools.

But sometimes mandates, especially those that control funds or have funding mechanisms, require institutional attention. In Ohio, there was an interesting, and dreadful funding proposed that originated in the state's coordinating board, the Ohio Board of Regents, which assists the legislature in coordinating public college funding formulae. The OBR proposed in 1996 a plan that was intended to tie a portion of annual state funding to the state's five public law schools to the two quantifiable measures used

by the schools to admit students: their grade point average (GPA) and the Law School Admission Test (LSAT) score (Dooley, 1996).

The OBR plan, which was to take effect in 2000, would have provided subsidy in a two-step fashion. In the first tier, schools would get funding for all Ohio students who fell above the setpoint of a median GPA (3.25) and median LSAT (65^{th} percentile); for the second phase, the schools would receive additional funds for each Ohio resident student with a 3.5 GPA and 80^{th} percentile LSAT ("second capped tier"). In addition, the schools would get a subsidy for ten percent of any state students, irrespective of their scores.

This complex formula, with additional and reduced non-resident provisions, was predicted to equate to 124 fewer first tier subsides (at $4,625 per fulltime resident student) at Cleveland State, as one example. The Ohio State and University of Cincinnati schools would likely have gained under the plan, while Akron, Toledo, and Cleveland State would have likely lost resources relative to the then-existing plans.

Deans of the three northern law schools, faced with the prospect of substantially-reduced funding, loudly protested, as did officials at the Law School Admissions Council (which devises and administers the LSAT). The LSAC executive director, for example, opined that the funding plan was "a terrible misuse" of the LSAT, which is intended only as an admissions tool, predicting likely success in the first year of law school. "My objection is really as strong as I can make it," he said (Dooley, 1996).

Misuse of the LSAT even in the admissions process is itself a major problem, as the test is a mild predictor of law school first year grades, even when combined with the GPA for undergraduates. It has been my own experience in serving on admissions

committees for many years, and after reading thousands of law schools and graduate applications, that there is an institutional overreliance upon standardized test scores. Particularly pernicious is the common law school practice of combining LSAT scores and GPA's into a weighted index score, and then using the test score again as a criterion in making the decision, in effect counting a score twice. Such practices simply give test scores a weight they cannot bear, especially in psychometric terms. I have written about this (too) extensively, so I spare readers here the details, but one important point is worth noting: in educational circles, we accord too much deference to standardized tests, imbuing them with near-cult reverence and significance.

But using test scores and grade point averages to determine state appropriations is just a poor idea. Not only would such legislative funds drive the admissions process, but it would mean that the law schools would be seduced into weighting these two criteria even more than they currently do. Just as the inclusion of such numbers in ranking schemes (such as U.S. News & World Reports) leads the tail to wag the dog, so would Ohio public law schools choose their student bodies on numbers, instead of the many criteria available to then, such as essays, life experiences, work records, letters of reference, and the dozen of other markers included in the typical application package.

If legistures want to condition funds, I believe better public policy ends are advanced by employing exit criteria, such as graduation rates, rather than entrance indices. If higher education's value is transformative, there need to be many avenues to admission, and fewer limitations upon the raw materials - students. If a legislature wishes to cap the total number of hours a student can take without graduating, or limit how long they can matriculate, or even use capitation funds to expand or restrict

professional school spaces (such as precious spots in medical, dental, veterinary, or pharmacy schools), then thoughtful plans and financial formulae to do so are welcome. And using reasonable restrictions on non-residents, while usually a bad idea, is at least grounded in reasonable public policies. But the colleges need exclusive jurisdiction and discretion over the admissions process, especially in post-baccalaureate programs such as professional schools and graduate schools.

Are there better ways for states to improve their professional school funding systems? Yes, including several that are difficult to undertake. First, formulae should be reviewed for their efficiency and efficacy; this includes fully funding the fiscal programs in place. I have examined many states that have reasonable and detailed formulae for funding professional schools, even including such complex schemes as professional libraries, which are not fully funded, so that each year is catch-up. Compacts and "rental" space arrangements should be regularly reviewed. For instance, some states lease spaces in high-demand/low supply programs, such as optometry and pharmacy schools in other states. The University of Houston, for example, holds a number of places in its pharmacy and optometry schools for residents of other states that do not have such programs. Baylor College of Medicine in Houston, a private institution, is paid a subsidy for each Texas resident medical student it enrolls; in New York, Cornell's veterinary school has a similar arrangement as a "statutory college," although the host institution is a private, Ivy League university. An interesting court case arose at Alfred University, when several students were dismissed for disciplinary infractions, yet students in the state-sponsored Ceramics engineering program were given more due process that other students in the private college, due to New York State's contracting of their places. If it were done

carefully and with input from the institutions, plans to expand or contract enrollments could be undertaken in reasonable fashion, especially if there were long term planning, not just year-to-year fluctuations. And while it is difficult to do well, programs could be closed or eliminated. There are cases that show how it can be done successfully (such as Moore v. Board of Regents, where the SUNY regents closed doctoral programs in English and History at SUNY-Albany), and ones where the institution acted badly or ineptly, such as Behrend v. State of Ohio, where Ohio University closed its School of Architecture, but did it so fitfully and poorly that the OU students affected won a judgment that even reimbursed them for losses due to their wasted time. Of course, it is easier to move a graveyard than it is to close a program, but in many respects it is preferable than giving thin gruel to existing programs, causing then to grow gaunt.

As a postscript, the OBR conducted additional research, including testimony from the Ohio law deans, and withdrew the proposal before it was to be implemented in 2000.

C. Program Discontinuance

I have never heard a reasoned discussion of faculty tenure take place where the words "faculty deadwood" were spoken. This term, like other codewords - "right to work," "choice," and "national security" come to mind - disguises more than it reveals. After more than two decades in the academy, I am not blind to the fact that some few colleagues do not carry their weight, or have lost their effectiveness in their duties, these are a small and almost irreducible number, surely in contrast to those many who dedicate their lives to the professoriate and who spend (too) many hours in their classrooms, offices, labs, and libraries.

Should faculty not perform their duties, there are several means of removing them, ranging from informal "pushouts" all the way to more formal tenure revocation firings. In my own experience as a faculty member, program chair, and associate dean, I have participated in the whole range of such activities, trying to make even the most difficult cases as humane as was possible. (I confess that I have even not always been entirely truthful or forthcoming when asked about some troubling colleagues who were under consideration elsewhere. I am particularly remorseful about one incident, where I glossed over one schnook's difficulty as a colleague and poor work habits, when I was called by a search committee at another school. In a technical sense, I did not lie, but I concede I offered no elaborations upon his poor record as a colleague; judging by how many times I have been burned by others' lack of candor when the situation was reversed, I will have many colleagues in purgatory with me when we all die.)

The American Association of University Professors (AAUP) has promulgated extensive guiding principles and detailed guidelines for dismissing faculty, from denying tenure to removing tenured faculty. To remove faculty with tenure, the AAUP allows removal for cause (such as certain medical reasons, faculty malfeasance, or moral turpitude), as well as removal not for cause, but for intervening acts, such as bona fide institutional financial exigencies, and authentic program discontinuances. (In earlier times, before Congress abolished the practice, mandatory retirement was a widespread practice in higher education, and another example of dismissals not for cause.)

But in my view, program discontinuance (or in AAUP's infelicitous but thorough terminology, "Discontinuance of Program or Department Not Mandated by Financial Exigency") is a prime example of bad governance. In bona fide financial exigency

proceedings, all the books are opened, and a massive institutional bankruptcy procedure is undertaken, with faculty involvement and shared governance. Everyone understands that there is a widespread problem, and realizes that sacrifices will have to be made, even if it means cutting programs and faculty. Poorly done, you have Bloomfield College (AAUP v. Bloomfield College), where the judge found the crude plan to eliminate faculty a transparent ploy that did not even save money. However, done right in a collaborative and professional way, as in Krotkoff v. Goucher College, courts will ratify such a practice. In Krotkoff, the Goucher College faculty and administrators made the difficult decision to let a tenured German literature faculty member (one of several) go in favor of another tenured faculty member who could teach both German and French language courses, the service courses needed most. In this instance and other non-Bloomfield types of cases, judges have upheld such decisions, especially when they are made with faculty participation. In the Goucher College case, the judge noted, "the necessity for revising Goucher's curriculum was undisputed. A faculty committee accepted elimination of the classics department and reduction of the German section of the modern language department as reasonable responses to this need."

And the entire college need not be in financial trouble to trigger cutbacks, as the AAUP program discontinuance policies indicate. In Scheuer v. Creighton University, the Creighton School of Pharmacy was in financial distress, due to cutbacks in federal health funds, while the rest of the University was relatively healthy; thus, it was held that tenured Pharmacy faculty member Scheuer could be dismissed under the theory that financial exigency need not be necessary in the entire institution for its principles to apply -- as long as there was due process available, and institutional bona fides.

While I could quibble with elements of the Scheuer case, where the trial record raises some questions, I could live with a result that in a comprehensive institution the entire enterprise need not be in a death rattle before exigency or program discontinuance procedures are employed, provided the faculty are involved in the decisionmaking and that it be bona fide. (I suppose it is only fair that I reveal that I am a long time AAUP cardholder, and served two terms as its national General Counsel.)

These examples I have discussed are not the examples of bad decisionmaking that is the subject of this Chapter. But the two I present next are textbook examples, both because they go way over the line of good faith, approaching Bloomfield College status, and because they were so unnecessary in their shallowness, shortsightedness, and meanspiritedness - - in short, they are prime dictionary-quality entries in the book of bad college governance. The first, Browzin v. Catholic University of America, flabbergasts me each time I teach it in my Higher Education Law class, for it, along with the University of Houston case I will consider it next, are the nadir of program discontinuance and financial reasons for dismissing faculty. In my own value system, I consider these two cases to be the Dred Scott of faculty dismissals, or at least the deliciously bad theater of Dan Aykroyd.

Catholic University of America (CUA) had a large School of Engineering and Architecture, where in 1962 Professor Browzin began to teach in the fields of Structures, Soil Mechanics, and Hydrology. I have been advised by engineering professor friends that these are traditional, bread and butter courses in many departments of civil or mechanical engineering. By the 1969-70 year, Browzin had received tenure, but was

notified that he would not be renewed after 1970 due to a financial retrenchment and reorganization in the School. He sued for reinstatement.

At the time of this case, the AAUP principles did not have a separate provision for program discontinuance, such as became necessary after the Browzin case. Unfortunately for Professor Browzin, the AAUP program discontinuance provisions in force in 1970 were incorporated into the financial exigency regulation, which proved to have enough wiggle room in it that Judge Skelly Wright held for CUA. The Regulation then-in-force read as follows:

> Where termination of appointment is based upon financial exigency, or bona fide discontinuance of a program or department of instruction, Regulation 5 [dealing with dismissals for cause] will not apply...In every case of financial exigency or discontinuance of a program or department of instruction, the faculty member concerned will be given notice as soon as possible, and never less than 12 months' notice, or in lieu thereof he will give given severance salary for 12 months. Before terminating an appointment because of the abandonment of a program or department of instruction, the institution will make every effort to place affected faculty members in other suitable positions. If an appointment is terminated before the end of the period of appointment, because of financial exigency, because of the discontinuance of a program of instruction, the released faculty member's place will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and a reasonable time within which to accept or decline it (527 F. 2d 843, 1975).

Given this conflation of "financial exigency" and "abandonment of a program of instruction" (program discontinuance), CUA's only obligation was to consider Browzin should a "suitable position" open with two years.

Here is where the judge got snookered. He took CUA at its word that they had undertaken a "detailed review" and that no suitable position was available. Yet within eighteen months after Browzin was forced to leave, the Department brought on another faculty member who went on to teach two courses in Water Resources (Hydrology and Hydraulics) and a new course in Planning. Planning !?! Remember, Browzin had taught Structures, Soil Mechanics, and Hydrology. When he offered to take on another course in Structure Design, he had been told other faculty were teaching it, including one who had joined the Engineering faculty in 1960, two years before he had done so. Judge Wright goes on to note that the Planning emphasis would likely attract new students and additional external funds for research. He concluded, "clearly, [this planning emphasis] was a program significantly different from what Browzin had been teaching...." He also noted some vague admonitions from an accrediting report that referred to the need for planning. Sic transit gloria Browzin.

Let's review what happened in this sleight of hand: The new guy would teach Browzin's courses, plus a course on Planning. A single course had become a program, one of a professor's four-course teaching load. Browzin had been hired in 1962, taught basic courses, received tenure, and was dismissed seven years later as an anachronism.

The could-have/should have list here is a chapter by itself: How could a person teaching basic courses for which he had been recently hired become obsolete? How is the need for one new course an entire new program undertaking? How could the new

person who was to teach three of Browzin's four courses not be a replacement, triggering the "suitable position" requirement? How could he become "obsolete" within seven years of being hired? Why didn't they just make the next hire one that included Planning as a field, if it is one? If it is a discrete field of study, why not send Browzin to the University of Maryland, Howard, George Mason, George Washington, or Georgetown to sit in and audit a Planning course so he could teach it himself? How can one course or even a new emphasis trigger such a reaction? Where is the searching and detailed review that coughs up one quarter of a recently tenured professor's load? How could a trial judge and a distinguished appellate judge get this so wrong? How could the CUA faculty be so asleep at the switch?

Surely the institution starts out with the presumption that is acting in good faith and the opportunity to show that it was searching and thorough in its program review. Doing so virtually assures a college of meeting AAUP standards and passing judicial scrutiny, should there be a suit. But buried in this sad decision is the evidence of a person's career at CUA ended over a one course revision. The AAUP, which entered an amicus brief in this case on behalf of Professor Browzin, rewrote its policy after the case was decided, so as to give additional procedural safeguards to the program discontinuance process and to separate it from its parent, i.e., financial exigency.

Another example of an institution behaving poorly in a similar fashion is my own, as exemplified by Spuler v. Pickar, a 1992 case where a German department faculty member, Richard Spuler was denied tenure because of "financial circumstances" in the department. Because he was untenured, he was not entitled to a tenured position, according to the appeals court and the trial judge, who had overturned a jury verdict in

Spuler's favor. Although in a narrow sense, the decisions may have been technically correct, buried in them is real evidence of how bad faith and poor policy can combine to cause genuinely bad decisionmaking.

First, the UH German department, like many, was suffering stagnant enrollments - in contrast to Spanish, which was growing and replacing vacancies in predominantly-Latino Houston - - and this was given as the reason for not tenuring Spuler. But Spuler was hired only five years earlier, and in any event, cutbacks in the department's funds were entirely administrative, that is, administrators in the College determined which program areas would receive more and which would receive less. My own discussions with UH senior and college officials at the time revealed that Professor Spuler made approximately $29,000 for 9 months, in a College with over a $60 million budget, in a university with over a $200 million budget in 1992. In addition, a more senior, tenured faculty member left at the same time, but the department chair determined that the need was for a German literature professor, and the court accepted this "tradeoff": "... two months after Spuler departed, the University advertised nationally for a German professor. The University explained that Spuler was a linguistics expert and taught elementary courses, while the professor who resigned was a professor of German literature. Although the basic languages acquisition courses could be taught by any German Department faculty member, specialized knowledge -- which Spuler lacked - - was needed to teach the literature classes."

Shades of Browzin, who "lacked" the expertise to teach Planning. Spuler had been hired five years earlier, and taught the subject matter and course load he was needed to teach, yet when the financial decision was made, he was not redeployed to teach

literature, simply because he had not taught it. At UH, there was not even CUA's effort to gin up a program discontinuance. And at Goucher, Krotkoff wanted to be redeployed to an Economics vacancy, an area where she was certainly not qualified to teach.

But UH committed an even graver sin, by inviting Spuler to apply for tenure in his fifth year, where his portfolio went all the way to the University-wide Promotion and Tenure Committee. While it is true that AAUP and UH standards do not require untenured faculty to be told the reasons for their denial of tenure, there has to be a point at which the college is stopped from asserting financial reasons, especially when there are no institutional determinations of financial exigency or program discontinuance. As bad as CUA's revocation of Browzin's was after a program review, UH's dismissal of Spuler is in some ways worse, after Spuler was led to believe his case would turn on his merits. One died by fire, another by ice, but both suffered not for cause, but for enrollment fluctuations. In large and comprehensive multiversities, no single faculty member should be reconstituted as a program or a casualty of short term enrollment fluctuations. If there were such fluctuations, institutions should not hire faculty, only to dismiss them within the decade. Universities are built upon a series of cross-subsidizations, and budgets should not be balanced upon the backs of such faculty. And, at the least, decisions to terminate persons should be made before they enter the tenure chute.

D. Playing Immigration Cop

Imagine that a United States embassy is overrun and its employees taken hostage. Further, all this takes place on television and our government is unsuccessful in rescuing embassy employees. Things are bad, and at a diplomatic and military standoff. Feelings run high against this country. As it turns out, many students from this country are

international students at U.S. colleges and universities. At a public university in my home state, New Mexico, state college trustees pass the following resolution:

> Any student whose home government holds or permits the holding of U.S. citizens hostage will be denied subsequent enrollment to New Mexico State University until the hostages are released unharmed. The effective date of this motion is July 15, 1980 (Tayyari v. New Mexico State University).

Of course, I couldn't make this kind of stuff up, for I cannot, even on a bad day, imagine how a group of smart people, savvy enough to be appointed to an important board, can act so deliciously badly. To be sure, when national security is threatened at home or abroad, as in this case twenty years ago, even reasonable people have vengeful fantasies or think the worst of all people who originated from that country. If truth is war's first casualty, surely national origin is its second. Moreover, in the singular case of Iran, it was widely remembered that Iranian students in Iran and in the United States were openly opposed to the Shah's regime, and many paid with their lives for this opposition. When the Shah's regime was overthrown, and the embassy eventually occupied, it was students who led the action. Thus, anger at Iranian students was not surprising.

The United States government responded by requiring all non-immigrant Iranian students (predominantly those on F-1, or student visas) to report to the Immigration and Naturalization Service (INS) or be deported. In Narenji v. Civiletti, this administrative roundup was upheld as lawful. But immigration is an exclusive concern of the federal government, and states, including state colleges, may not enact their own immigration or diplomatic policies, under the doctrine of preemption.

Thus, the court saw through the NMSU regent policy, which was guised in fiscal concerns (the Iranian students at the college would renege on their tuition and fee bills) and in safety concerns (they were worried that physical harm might befall these students on campus). The judge properly rejected these transparent claims, and invalidated the trustee policy.

Following the heinous September 11, 2001 attacks in the United States, there has been a rush to single out international students, as several of the terrorists had been students in U.S. flight schools or in the country on student visas. For example, after several years of allowing undocumented college students to establish in-state residency in the City University of New York (CUNY), this policy was overturned following the attacks (Olivas, 2002). Just the summer before, Texas had enacted legislation that allowed the undocumented to attend college as residents, while California did so as well, after 9/11 (Olivas, 2002). Although many colleges turned over international student files to the FBI and other federal agencies, a number of colleges refused to do so without warrants or subpoenas. The PATRIOT Act, the omnibus legislation governing immigration and terrorism, included a number of provisions that turned up the heat on colleges enrolling international students and on the students themselves. Many students withdrew and returned to their home countries until things were restored to some semblance of order.

Just as in earlier times, when the British Empire would not let the laws of Trinidad and Tobago rule their interests at sea, so the U.S. government could not allow New Mexico State University to have its own foreign policy. In a certain sense, given the

strong feeling occasioned by Iran in 1980 and the Taliban and Al Queda in 2001, what is remarkable is not how many colleges behaved so badly, but how few did so.

Conclusion

Paraphrasing Delgado and Stefancic's principles - "serious moral error" includes cases that "lack [] nuance to an embarrassing degree," are "broadly or universally condemned by subsequent generations", and their "assumptions...are roundly refuted by later experiences." They consider the matters they discussed as "monstrous, anomalous -- a moral abomination" (Delgado & Stefancic, 1991, p. 1930). The examples I discussed are not necessarily of this high order, and did not happen long ago, or long enough ago to have gained the kind of disapproval their cases had gained. Indeed, colleges won the financial exigency and program discontinuance cases. I chose these cases because in my view, the colleges or decisionmakers (including faculty) all acted badly, even if legally. By the criteria I am developing here, it does not have to be illegal to be bad decision-making.

I would argue that each of the cases I examine is a confluence of bad judgments, poor research, and failure to discern the larger harm to the higher education polity. The Ohio Board of Regents funding formula was so badly developed that it was never actually put into place; relatively few public schools employ alumni/legacy admissions because they are so unfair and because admissions criteria are under more widespread scrutiny; most colleges weather cashflow or enrollment fluctations better than did Catholic University or the University of Houston in the Browzin or Spuler instances; and most colleges do not want to play like they are the immigration police.

I believe that there are many such cases out there in the ether, and I urge scholars to track, publicize, and study them. While there are promising theoretical approaches to understanding organizational failure, there is much more work to be done in this regard. In this chapter, I tracked several possible models that could be used to implement policies, and suggested that variations on them might be useful to understand bad policymaking - - the failure to implement, to communicate, etc, and I employed a quasi-legal standard of abject moral failure, as was suggested by legal scholars Richard Delgado and Jean Stefancic to explain legal decisions that had become widely known as embarrassing over time. This comparison, while instructive, is not theoretical and in some ways not a good parallel, given the basic differences between judicial decisionmaking and higher education policymaking.

In her vexing book Stupidity, Avital Ronell sets out a general theory of why people act stupidly. Because I am not fully conversant in the foreign language of postmodern, I have struggled more than should be necessary to understand this provocative and densely packed book. In trying to explain the work of the early 20th century German philosopher Robert Musil, Ronell explains:

> What Musil has marked with great clarity and necessity is the general infiltration of stupidity, the need for a double valuation (there is, without fail, good and bad, slow-and fast-tracked stupidity), the way it mimes values such as talent, progress, hope - indeed, the way stupidity has pervaded our highest values - and his example for this actuality is a Nietzschean one. He shows how the incontestable virtue of loyalty easily succumbs to the stupidity of the we, gathering the They into an obedience

> school on collective parade. Finally the we cannot be relegated simply to the other shore but falls on me in my own singularity, at least occasionally, with determined regularity. I am hit by the They of which I am at times a part. I am not spared my own stupidity, that of the They, when I join the we. Stupidity in the end is linked to the finity of knowing. In order to name the limit of knowing, Musil resorts to the mark of the we: "Occasionally we are all stupid". Because our "knowledge and ability are imcomplete, we are forced in every field to judge prematurely". While this observation offers the mood and cadence of a "happy ending" for Musil's troubling topic - we are all in this together, we are forced by the very nature of finitude: stupidity is what we share, the share of existence in which we take part - it is build on the abyss of judgment. Stupidity, which, Musel writes, falls due to each of us *occasionally*, rests on the wobbly scale of a premature judgment. But is it not possible that judgment is constitutively premature, always ahead of the justice it might have rendered? (Musil, 2002, p. 93)

Occasionally, we are all stupid. I certainly have felt this way, more often than I would like to admit. Once, when asked by a Chronicle of Higher Education writer what I thought of legacies, I said something smartassed like demography would cure those as well. As if. Just as actors can not tell in advance that the movie will turn out to be just dreadful, so we make decisions we later come to regret, usually through better data, better strategic reasoning, and better collegial means.

Even so, this preliminary inquiry revealed some reasons why good people do bad things as college trustees or policymakers. I hope that this early attempt will attract others to the field, and that we will better understand bad governance. Doing so will surely enhance our ability to understand good governance and higher education policymaking. Most of us learn from our mistakes, and decisionmakers are no different.

I admire the ambition of Peter Hall, whose excellent work Great Planning Disasters helped me think through this project. In his 1979 work, he noted, "I do not want to seem to promise more than this book can deliver. There will be no grand overarching model which will explain all previous disasters and guarantee how to avoid new ones. The object is to begin an explanation, not to end one" (Hall, 1980, p. 1-3). I hereby adopt this modest viewpoint.

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